Office - Supreme Court, U.S.
FILED
OCT 8 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 488

JOHN A. ROSENFELD,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

WILLIAM T. FITZGERALD,
817 Citizens Bank Building,
Evansville, Indiana,
Attorney for Petitioner.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

TABLE OF CONTENTS.

	PAGE
Opinion Below	1
Questions Presented	2
Statutes and Rule Involved	2
Statement	2
Reasons for Granting Writ	7
Appendix I	21
Appendix II	25
Appendix III	26
Appendix IV	27

TABLE OF AUTHORITIES.

Cases.

Castellini v. U. S. (1933, C. C. A. 6), 64 F. 2d 636	12
Coco, et al. v. U. S. (1923, C. C. A. 8), 289 Fed. 33	7, 10
Dunaway v. U. S. (USCA, DC, 1953), 205 F. 2d 23	14
Fiswick, et al. v. U. S. (1946), 329 U. S. 211	18
Gable v. U. S. (1936, C. C. A. 7), 84 F. 2d 929	18
Gallahan v. U. S. (1924, C. C. A. 8), 299 Fed. 172	7, 11
Linde v. U. S. (1926, C. C. A. 8), 13 F. 2d 59	8, 16
McElroy v. U. S. (1896), 164 U. S. 76	11, 18
U. S. v. Tannuzzo, et al. (1949, C. C. A. 2), 174 F. 2d 177	18

Statutes.

18 U. S. C. A., Sec. 1010	3
18 U. S. C. A., Sec. 371	3
28 U. S. C. A., Sec. 1254 (1)	2
Rule 8, Federal Rules of Criminal Procedure, (18 U. S. C. A., pages 179-180)	9

DARK PA

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. .....

JOHN A. ROSENFELD,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, John A. Rosenfeld, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in this case on September 10, 1956.

OPINIONS BELOW.

There was no opinion in the District Court.

The opinion of the Court of Appeals has not been reported. A copy is appended as Appendix I.

E BLEEDTHRU

JURISDICTION.

The judgment of the Court of Appeals was entered on June 29, 1956. A copy is appended as Appendix II.

A petition for rehearing was denied on September 10, 1956. A copy of the order of the Court of Appeals denying the petition is appended as Appendix III.

Jurisdiction to issue the writ rests on Title 28, United States Code Annotated, Sec. 1254 (1).

QUESTIONS PRESENTED.

Did the Court of Appeals err in sustaining the action of the District Court in overruling the petitioner's verified motion for a severance and for a separate trial by holding that Rule 8 (b) Federal Rules of Criminal Procedure permits the joinder in one indictment and common trial of two or more defendants charged with distinct and separate offenses of the same class where all defendants are not charged in each count and the indictment not alleging that the defendants acted in concert or entered into any conspiracy to commit the offenses set out in the indictment.

Did the Court of Appeals err in sustaining the conviction of petitioner under the conspiracy count by finding there was sufficient evidence underlying the jury's verdict to uphold the District Court's action in overruling petitioner's motions for judgment of acquittal, for a new trial and arrest of judgment.

STATUTES AND RULE INVOLVED.

The statutes and rule involved are set out in Appendix IV.

STATEMENT OF THE CASE.

The judgment of the Court of Appeals sought to be reviewed, affirmed a judgment convicting the petitioner

DARK PAGE BLE

of conspiracy to violate Sec. 1010 of Title 18 U. S. Code (Appendix IV) making it unlawful to knowingly make or cause to be made a false statement to obtain loans intending that they be offered to the Federal Housing Administration for insurance.

The petitioner, in Count I of a Six-Count Indictment, was charged with a violation of Title 18, U. S. C., Sec. 1010, 18 U. S. C. A. 1010 (Printed Record, page 5; Appendix IV) and in Count II of entering into a conspiracy with a co-defendant, Seymour S. Cutler, to violate Title 18, U. S. C., Sec. 1010, 18 U. S. C. 1010 (Printed Record, pages 5-6; Appendix IV) said Count being predicated on Title 18 U. S. C. 371, 18 U. S. C. A. Sec. 371 (Appendix IV).

Counts III and V of the Indictment charged defendants other than petitioner with violation of Title 18, U. S. C. Sec. 1010, 18 U. S. C. A. 1010. (Printed Record, pages 6, 8.)

Count IV charged the defendant, Seymour S. Cutler, with a co-defendant, of entering into a conspiracy to violate Title 18, U. S. C., Sec. 1010, 18 U. S. C. A. 1010, said Count being predicated on Title 18 U. S. C., Sec. 371, 18 U. S. C. A. 371. (Printed Record, page 7.)

Count VI charged the defendant, Seymour S. Cutler, with a co-defendant, of entering into a conspiracy to violate Title 18, U. S. C., Sec. 1010, 18 U. S. C. A. 1010, said Count being predicated on Title 18 U. S. C., Sec. 371, 18 U. S. C. A. 371. (Printed Record, page 7.)

The petitioner filed his motion requesting the court to grant him a severance of the charges against him in Counts I and II and that he be granted a separate trial from the other defendants charged in Counts III, IV, V and VI, for the reason the Indictment did not charge he acted in concert, or participated in the same act or transactions charged against the other defendants, and distinct and

BLEEDTHRU

separate offenses being charged against the other defendants in Counts III, IV, V and VI, he could not be charged and tried jointly under the Indictment. (Printed Record, pages 10, 11, 12, 13.) The Court overruled this motion. (Printed Record, page 13.)

The defendants under Counts III and IV were not tried, having been granted a severance and a separate trial under Counts III and IV.

Trial was held by jury under Counts I, II, V and VI of the Indictment, the jury finding the defendants, Cutler and petitioner, guilty under Count I of the Indictment (Transcript, page 46) and under Count II of the Indictment (Printed Record, page 18) and finding the defendants Cutler, Robertson, and Johnson not guilty under Counts V and VI of the Indictment. The Court, after the return of the verdict of the jury, sustained a motion of the petitioner made at the close of all the evidence for judgment of acquittal as to Count I of the Indictment. (Printed Record, page 23.)

At the close of the Government's evidence, and at the close of all the evidence, the petitioner moved the court for judgment of acquittal in his favor under Count II (Printed Record, pages 15 and 17) which motions were overruled by the Court. (Printed Record, pages 16 and 17.)

The petitioner filed his motion for arrest of judgment (Transcript, page 47) and his motion for a new trial under Count II of the Indictment (Printed Record, pages 20, 21, 22) which motions were overruled by the Court. (Printed Record, page 23.)

The Court rendered its judgment on the verdict of the jury under Count II of the Indictment and committed the petitioner to the custody of the Attorney General for imprisonment for the term of two years for the conspiracy

DARK PAGE BL

offense charged in Count II of the Indictment. (Printed Record, pages 24-25.) From this judgment, the petitioner appealed to the United States Court of Appeals for the Seventh Circuit. (Printed Record, page 26.)

To sustain the charges against the petitioner in the conspiracy charged under Count II of the Indictment, the Government introduced evidence showing that the petitioner was a salesman for the Consolidated Home Improvement Company owned by defendant Cutler of Evansville, Indiana, and that he called upon Herbert Ray Johnson on February 9, 1954, for the purpose of selling him siding for his home. That Johnson stated he was not financially able, due to present financial obligations, to incur any other indebtedness. To induce Johnson to enter into a contract for the siding of his home, petitioner promised and did pay Johnson $300.00 to alleviate his financial obligations and did promise Johnson that his home would be used as a model home and that for every sale of siding made in the future by Consolidated Home Improvement Company as a result of advertising the home, Johnson would receive the sum of $50.00 which would be sufficient to take care of his obligation under his siding contract. That as a result of said promises and bonuses, Johnson signed a contract, note and an F. H. A. I application for a loan. That Johnson's home was not used as a model home, and he never received any $50.00 bonus at any time. (Official Reporter's Transcript, pages 95-141; pages 142-159; pages 172-176; pages 277-293; pages 184-190.)

That the F. H. A. documents were submitted to the Old National Bank in Evansville by Consolidated Home Improvement Company of Evansville, Indiana, and that as a result a loan was processed through the Old National Bank and insured by the Federal Housing Administration. (Official Reporter's Transcript, pages 9-93.)

BLEEDTHRU

The Government also introduced the testimony of Robert L. Brannon, Special Agent of the F. B. I., who testified as to an interview with defendant Cutler on December 13, 1954, 10 months after the conspiracy charge in Count II was alleged to have ceased and at a time when the Consolidated Home Improvement Company was out of business. The Court instructed the jury to disregard this testimony as to petitioner's participation in the conspiracy charged under Count II and it was admitted only for the purpose of sustaining the conspiracy charge against Cutler and the substantive counts against defendant Cutler and petitioner under Count I of the Indictment. (Official Reporter's Transcript, pages 296-313.)

After the introduction of the above testimony, the United States Attorney announced he had established a prima facie case against the petitioner, under Count II of the Indictment and requested the Court to be permitted to introduce evidence and to establish intent and to show a pattern or design of a common scheme or plan on behalf of all defendants. (Official Reporter's Transcript, page 328.) The petitioner objected to the introduction of such evidence to sustain the conspiracy charge under Count II for the reason that a prima facie case of conspiracy had not been established (Official Reporter's Transcript, pages 343-346) which objections, the court overruled. (Official Reporter's Transcript, pages 343-346.)

The Government then proceeded to introduce the testimony of witnesses and introduced into evidence exhibits showing that petitioner had approached other persons with the model home and bonus technique which, it contended, proved the intent of the petitioner to commit the crime of conspiracy under Count II of the Indictment. (Official Reporter's Transcript, pages 350-373; 376-388; 391-407.)

The Government introduced the testimony of a witness

DARK PAGE BL

who testified that petitioner's co-defendant Cutler, in April, 1953, approached him with the model home and bonus technique. (Official Reporter's Transcript, pages 408-426.) This occurrence was ten months previous to the time the Government alleged the conspiracy was entered into between petitioner and his co-defendant, Cutler, and was objected to on the part of the petitioner. The Government introduced testimony of witnesses and introduced exhibits into evidence showing that other defendants charged in other Counts of the Indictment used the model home and bonus technique. (Official Reporter's Transcript, pages 427-437; 441-470; 472-501; 510-519; 520-545; 546-559; Government's Exhibits: 4-A, 4-B, 4-C, page 399; 5-A, 5-B, 5-C, page 565; 6-A, 6-B, 6-C, page 452; 7-A, 7-B, 7-C, page 531; 8-A, 8-B, 8-C, page 363; 10-A, 10-B, 10-C, page 64; 13-A, 13-B, 13-C, page 419) to which testimony and exhibits, the petitioner objected. (Official Reporter's Transcript, pages 353, 355, 362, 391, 398, 410, 418, 439, 451, 488, 511, 515-516, 521-522, 529.)

REASON RELIED UPON FOR THE GRANTING OF A WRIT OF CERTIORARI.

The discretionary power of this Court is invoked on the following grounds:

(1) (a) The Court of Appeals for the Seventh Circuit, in holding that there was proper joinder of defendants in the Indictment, has rendered a decision in direct conflict with the decisions of the Circuit Court of Appeals for the Eighth Circuit in *Coco, et al.* v. *U. S.* (1923, CCA 8), 289 Fed. 33, and in *Gallahan* v. *U. S.* (1924, CCA 8), 299 Fed. 172, and in direct conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in *Castellini* v. *U. S.* (1933, CCA 6), 64 F. 2d 636.

(b) The decision of the Circuit Court of Appeals for the Seventh Circuit, in finding the petitioner guilty of a

BLEEDTHRU

conspiracy charge where the only evidence in the record was to the effect that he was guilty of illegal acts, was in direct conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in *Linde* v. *U. S.* (1926, CCA 8), 13 F. 2d 59, and in direct conflict with well established Federal decisions.

(2) The Court of Appeals for the Seventh Circuit has decided a Federal question in a way in conflict with applicable decisions of this Court.

DARK PAGE BL

ARGUMENT.

(1) (a) The Court of Appeals, in the case at bar, decided without the citation of supporting authority and without detailed discussion that Rule 8 (b) of Federal Rules of Criminal Procedure, 18 U. S. C., did not warrant the petitioner's request for severance and separate trial.

In order to support this conclusion, no reasoning is set out by the court as to its interpretation of the rule, which explicitly states, in part, "two or more defendants may be charged in the same indictment or information *if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses.*" (Petitioner's italics.)

There is no allegation or allegations in the Indictment connecting or tending to connect the petitioner with the offenses alleged in Counts III, IV, V and VI of the Indictment and there is no allegation or allegations in the Indictment tending to connect the defendants Wagner, Robertson and Johnson with the offenses alleged in Counts I and II of the Indictment which involve the petitioner and his co-defendant Cutler. Furthermore, the case was not tried on the theory that petitioner was connected in any manner with any of the charges against the defendants in Counts V and VI of the Indictment. The case was not tried on the theory of a general conspiracy or general scheme between all defendants, but on the theory that some of the defendants entered into separate conspiracies and committed separate criminal acts. A mere cursory examination of the record and the rulings of the court make this very apparent. The face of the indictment itself charges several defendants for several offenses committed by them inde-

BLEEDTHRU

pendently of each other, some of which were committed by some of the defendants at one time and at one place and some of which were committed by others of the defendants at a different time and at a different place.

The decision of the Court of Appeals is in direct conflict with the decision of the Eighth Circuit in *Coco, et al.* v. *United States, supra,* which held that joinder cannot be sustained where the parties are not the same and the offenses are nowise parts of the same transaction, and must depend upon evidence of a different state of facts as to each or some of them and that joinder was not authorized by statute and, therefore, did not rest in the mere discretion of the court. In the *Coco* case, four defendants were jointly indicted on five counts. The first and second counts were identical and charged that on the 8th day of November, 1919, at No. 5035 Wilson Avenue, St. Louis, all defendants unlawfully possessed an unregistered still. The third count was in identical language, except it alleged possession of a still at No. 5033 Wilson Avenue. The fourth count alleged that on the 8th day of November, 1919, at No. 5033 Wilson Avenue, the defendants unlawfully possessed 13 barrels of mash. In the fifth count, identical language was used, except the street number was alleged as No. 5035 and the number of barrels of mash alleged as nine.

One defendant lived at No. 5035 Wilson Avenue, and the other defendants at No. 5033 Wilson Avenue. Two of the defendants moved for severance, alleging that evidence to be produced would not connect them with offenses alleged in three counts of the indictment. There was no evidence in the record connecting or tending to connect the defendants residing at No. 5033 Wilson Avenue with the offenses committed at No. 5035 Wilson Avenue and no evidence connecting or tending to connect the defendant at No. 5035 Wilson Avenue with the offenses alleged to have been committed at No. 5033 Wilson Avenue.

DARK PAGE BLE

The defend
was convicted
address and
Avenue were
committed at
adopted the r
U. S. 76:

t who resided at No. 5035 Wilson Avenue
f offenses alleged to have occurred at that
e defendants residing at No. 5033 Wilson
nvicted of the offenses alleged to have been
that address. The court, in reversing,
e laid down in *McElroy* v. *U. S.* (1896), 164

> "While t
> felonies o
> mode of
> same indi
> compel a
> where the
> are no wi
> depend u
> to each o
> case that
> barrassed
> attention
> their inju
> transactio
> thorized
> tion."
>
> general rule is that counts for several
> the same general nature, requiring the same
> ial and punishment may be joined in the
> ment subject to the power of the court—to
> election, such joinder cannot be sustained,
> parties are not the same, and the offenses
> parts of the same transaction, and must
> n evidence of a different state of facts as
> some of them. It cannot be said in such
> ll the defendants may not have been em-
> and prejudiced in their defense, or that the
> f the jury may not have been distracted to
> y in passing upon distinct and independent
> s. The order of consolidation was not au-
> statute and did not rest in mere discre-

It is very a
the case at ba

parent that the facts in the *Coco* case and
are analogous.

In *Gallahan*
formations w
Prohibition A
counts, the fir
19, 1922, unla
ing liquor. T
June 20, 1922,
The third cou
unlawfully po

v. *United States, supra,* three criminal in-
e filed charging violations of the National
t. The first information contained three
t count charging that A, B and C, on June
fully, at a soft drink parlor, sold intoxicat-
e second count charged that A, B and C, on
sold intoxicating liquor at the same parlor.
t charged that B, C and D, on June 21, 1922,
sessed intoxicating liquors at said parlor.

The second
and E on June

nformation was in one count, charging A, B
21, 1922, with unlawfully selling intoxicating

BLEEDTHRU

liquors at said parlor. The third information was in two counts and in the first count A, B, E and F on May 3, 1922, were charged with unlawfully selling intoxicating liquor at said parlor. The second count charged A, B, E and F with unlawfully selling intoxicating liquor at said parlor on April 2, 1922. The facts in this case are analogous to the facts in the case at bar.

The Eighth Circuit Court of Appeals held there could be no joinder under the rule of the *McElroy* case, and under the statute and stated "there were parties defendant in each information put upon trial who were not defendants in either of the other two informations."

In *Castellini* v. *United States, supra*, Indictment No. 1 charged a president, vice-president, and cashier, of a bank in 26 counts, charging on different dates they made and caused to be made false entries in the books of the bank. Indictment No. 2 charged the president and vice-president in two counts with having on different dates misapplied funds of the bank. The vice-president and cashier entered a plea of guilty to certain counts in Indictment No. 1 and the president entered a plea of not guilty to both indictments. The two indictments were consolidated at trial of president. He moved for an election upon which indictment the Government would seek a conviction which the court refused to grant. The president was acquitted under Indictment No. 1, convicted upon the first count of Indictment No. 2 and acquitted upon the second count of Indictment No. 2.

The Court of Appeals for the Sixth Circuit decided that an election should have been required under 18 U. S. C. A. 557, of which Rule 8 is substantially a restatement. The court held that the cashier was a defendant in Indictment No. 1 only and therefore the defendants were not the same in each Indictment. The Sixth Circuit Court of Appeals

DARK PAGE BL

in this case held that the fact that the president was placed upon trial alone was immaterial, for the test by which consolidation should be determined is not who was to be tried, but what appeared upon the face of the Indictment. At page 637 of the opinion, the court said:

> "In the sense that the offenses of misapplication of funds and of making false entries are created by the same act (section 592, tit. 12, U. S. C., 12 USCA Sec. 592), they each belong to the same general class, but, as indicated, the allegations of each count of both indictments were based upon separate and distinct acts and transactions, and, when the indictments were consolidated, the counts of each must be regarded as separate counts of the consolidated indictment (*McElroy* v. *U. S.*, 164 U. S. 76, 17 S. Ct. 31, 41 L. Ed. 355; *De Luca* v. *U. S.*, *supra*), and, when so regarded, it is apparent that the consolidated indictment charged separate and distinct offenses not all provable against the same defendants.
>
> We think, therefore, that the question of consolidation as well as of election after consolidation should have been ruled by *McElroy* v. *U. S.*, at page 80 of 164 U. S., 17 S. Ct. 31, 32, *supra*, wherein the court said:
>
> > 'It is clear that the statute does not authorize the consolidation of indictments in such a way that some of the defendants may be tried at the same time with other defendants charged with a crime different from that for which all are tried. And, even if the defendants are the same in all the indictments consolidated, we do not think the statute authorizes the joinder of distinct felonies, not provable by the same evidence, and in no sense resulting from the same series of acts.
> >
> > 'Under the third clause, relating to several charges "for two or more acts or transactions of the same class of crimes or offenses," it is only when they "may be properly joined" that the joinder is permitted, the statute thus leaving it for the court to determine whether in any given case a joinder or two or more offenses in one indict-

BLEEDTHRU

mer
the
in I
The Circu
Circuits hav
cases that we held in the *Castellini*, *Coco* and *Gallahan*
discretionar
grant a sev
Since the
effort to dis
the *Castelli*
with them.
between the
Court.
The *McE*
decided und
but they ar
statute and
criteria for
1953), 205 F
(b) If a
the jury, th
lish the exi
his co-defe
case can be
found any t
spiracy was
co-defendan
mitted to gt
conspiracy
into a cont
Title I app
and that th
porter's Tr

nt against the same person "is consistent with
settled principles of criminal law," as stated
Pointer's Case.' "

it Court of Appeals in the Sixth and Eighth
e held in the *Castellini*, *Coco* and *Gallahan*
f joinder is not permitted, then there is no
y power on the part of the court to or not to
rance or a separate trial.

Court of Appeals in the instant case made no
tinguish the *Coco* case, the *Gallahan* case, and
ni case, it is very apparent that it disagreed
That being so, there is a conflict of decision
two circuits, which calls for resolution by this

roy, Coco, Gallahan and *Castellini* cases were
er statute which antedate the present rules,
e still pertinent because of similarity of the
the rules, as well as because of the stability of
a fair trial. *Dunaway* v. *U. S.* (USCA, DC,
. 2d 23.

the Government's witnesses were believed by
ere were not sufficient facts that would estab-
tence of a conspiracy between petitioner and
dant Cutler in this case. The record in this
searched from end to end and there cannot be
stimony or circumstantial evidence that a con-
ever entered into between petitioner and his
gt Cutler. The only testimony in evidence per-
to the jury against the petitioner under the
ount was that he induced the Johnsons to enter
act to purchase siding and to execute an FHA
ication by the payment of a bonus of $300.00,
y would receive future bonuses. (Official Re-
anscript, pages 95-141; 142-159; 172-176; 277-

DARK PAGE BL

293.) This evidence would tend to show that the petitioner was guilty of a substantive offense, but fell short of connecting him with a conspiracy.

The Court of Appeals held, in its opinion, that the following facts were sufficient to establish a conspiracy between petitioner and his co-defendant Cutler: (1) That petitioner illegally induced the Johnsons to enter into a contract and to sign an FHA Title I credit application containing false representations and then submitted the contract and FHA Title I credit application to Cutler, who was the owner of Consolidated Home Improvement Company; (2) That Cutler, acting upon said contract and FHA Title I credit application, transmitted the same, together with a FHA Title I Completion Certificate signed by him and by reason of said papers, a loan was made by the bank and insured by the Federal Housing Administration; (3) That Cutler, on behalf of his company, signed the contract and signed the Completion Certificate; (4) That all other contracts and credit applications received in evidence were in the name of Consolidated Home Improvement Company, by petitioner's co-defendant Cutler, and signed by other co-defendant salesmen; (5) That the Johnson contract did not contain any mention of a payment of any bonus or future bonuses to the Johnsons.

The mere fact that petitioner committed a substantive offense by making a fraudulent statement in the FHA Title I application, and then submitted it to Cutler, falls short of proof that petitioner and Cutler conspired together to violate any United States statute.

The mere fact that petitioner was employed as a salesman by his co-defendant Cutler would not justify a finding of a pre-arrangement, planning or confederacy to conspire to commit a crime as charged in the Indictment. The mere fact that other contracts and credit applications received

BLEEDTHRU

in evidence were in the name of the Consolidated Home Improvement Company by Cutler and signed by other co-defendant salesmen and that other salesmen had illegally induced other purchasers of siding to sign credit applications containing false representations would not show a conspiracy between petitioner and Cutler.

F. B. I. Agent Brannon testified that on the 13th day of December, 1954, some ten months after the conspiracy alleged to have been entered into between petitioner and Cutler would have been at an end, Cutler told him that he instructed his salesmen individually that they were not to secure contracts and credit applications from customers by promising bonuses or by giving any other inducements. (Official Reporter's Transcript, page 303.)

The record is free from any evidence, direct or circumstantial, that petitioner and Cutler entered into any plan or scheme or conspiracy to induce customers to enter into contracts and applications for FHA loans by making inducements to them by way of bonuses or otherwise.

The decision of the Circuit Court of Appeals for the Seventh Circuit is in direct conflict with the decision rendered by the Circuit Court of Appeals for the Eighth Circuit in *Linde* v. *U. S.* (1926, CCA 8), 13 F. 2d 59. In the *Linde* case, defendants A and B, together with another defendant, were charged with having conspired, together with other persons unknown, to violate the National Motor Vehicle Theft Act. The court found that there was sufficient evidence to show that A and B knew that the automobiles sold to them were stolen cars but there was no evidence to show that they were parties to any general plan or conspiracy having as its objective the introduction of such automobiles from without the state for the purpose of disposition and sale. The Sixth Circuit held that their participation in the conspiracy rested merely on suspicion

DARK PAGE BLE

only arising from their acquaintance and association with some or all of the other conspirators but to establish a conspiracy to violate a criminal statute, the evidence must convince that the defendants did something other than participate in the substantive offense which is the object of the conspiracy. That there must be, in addition, proof of the unlawful agreement.

In the case at bar, the verdict of the jury in convicting the petitioner and his co-defendant Cutler on the conspiracy charge rested solely on speculation, suspicion and conjecture. There is no evidence in the record to disclose that petitioner had any acquaintance with any salesmen employed by Cutler and there was no evidence concerning any contact by petitioner with Cutler. The only testimony introduced in the case concerning petitioner's contact with Cutler was that of Robert L. Brannon, an F.B.I. Agent, who testified as to an interview with the defendant Cutler, on December 13, 1954, after the alleged conspiracy in Count II had ceased, and at a time when the Consolidated Home Improvement Company was out of business. The Court instructed the jury to disregard this testimony as to petitioner's participation in the conspiracy charged under Count II and it was admitted in evidence only for the purpose of sustaining the conspiracy charge against the defendant Cutler and the substantive counts against petitioner and Cutler under Count I of the Indictment. (Official Reporter's Transcript, pages 296-313.)

This testimony being admissible only as against Cutler could not in any manner prove the *corpus delecti, i. e.,* the alleged unlawful agreement between petitioner and Cutler, although it is very evident that the jury must have relied upon this testimony to sustain its verdict in finding the petitioner guilty under the conspiracy count of the Indictment. This was the only proof the jury could have

BLEEDTHRU

utilized in support of the conviction of the petitioner on the conspiracy charge. Testimony admitted as to a substantive count of indictment and not admitted as to a conspiracy count cannot be relied upon by the jury or the Government to sustain a conviction under the conspiracy count. *Fiswick, et al.* v. *U. S.* (1946), 329 U. S. 211.

When a record is devoid of any evidence, direct or circumstantial, that the defendant had any understanding or agreement, tacit or otherwise, to violate a criminal law, a conspiracy conviction should not be sustained. *U. S.* v. *Tannuzzo, et al.* (1949, CCA 2), 174 Fed. 2d 177; *Gable* v. *U. S.* (1936, CCA 7), 84 Fed. 2d 929.

(2) The Circuit Court of Appeals for the Seventh Circuit has construed Rule 8 (b) of Federal Rules of Criminal Procedure in a way in conflict with the decision of this Court in *McElroy* v. *U. S.*, 164 U. S. 76, 41 L. Ed. 355. This Court, in the *McElroy* case, held that the then joinder statute, which is substantially restated in the present Rule 8, Federal Rules of Criminal Procedure, did not authorize the joinder of distinct felonies not provable by the same evidence and in no sense resulting from the same series of acts.

The conspiracies alleged in Counts II and VI in the case at bar of the Indictment were distinct and disconnected and were not alleged to have been parts of a larger general scheme, and the evidence to prove the conspiracy count in which petitioner was not charged would not have been admissible against petitioner under the conspiracy count in which he was charged.

DARK PAGE BLE

CONCLUSION.

In conclusion, petitioner respectfully submits:

(1) That the Circuit Court of Appeals erred in sustaining the action of the District Court in overruling the petitioner's motion for a severance and for a separate trial.

(2) That the Circuit Court of Appeals erred in sustaining the conviction of petitioner under the conspiracy count of the Indictment by finding there was sufficient evidence underlying the jury's verdict to uphold the District Court's action in overruling petitioner's motions for judgment of acquittal, for a new trial and arrest of judgment.

(3) This petition for writ of certiorari should therefore be granted.

Respectfully submitted,

WILLIAM T. FITZGERALD,
Attorney for Petitioner.

BLEEDTHRU

APPENDIX I.

IN THE

UNITED STATES COURT OF APPEALS,

FOR THE SEVENTH CIRCUIT.

No. 11656. OCTOBER TERM, 1955, APRIL SESSION, 1956.

THE UNITED STATES OF AMERICA, *Plaintiff-Appellee,*
vs.
JOHN D. ROSENFELD, *Defendant-Appellant.*

Appeal from the United States District Court for the Southern District of Indiana, Evansville Division.

June 29, 1956.

Before FINNEGAN, SWAIM and SCHNACKENBERG, *Circuit Judges.*

FINNEGAN, *Circuit Judge.* Seymour S. Cutler, a co-defendant of Rosenfeld whose appeal is before us, owned the Consolidated Home Improvement Company of Evansville, Indiana. Rosenfeld was employed as a salesman for Cutler's firm. In counts 1 and 2, of a six-count indictment, Rosenfeld and Cutler were both charged with violating 18 U. S. C. § 1010 (1952 ed.) and with conspiracy under 18 U. S. C. § 371 (1952 ed.). Count 1 is eliminated in this appeal because Rosenfeld's motion for judgment of acquittal on it was sustained below.

E BLEEDTHRU

Since much of Rosenfeld's appeal hinges on joinder and severance, we show the following analysis of the entire indictment:

Count	Defendants Named	Code Sec.
I	Cutler & Rosenfeld	18 U.S.C. § 1010
II	Cutler & Rosenfeld	18 U.S.C. § 371
III	Cutler & Wagner	18 U.S.C. § 1010
IV	Cutler & Wagner	18 U.S.C. § 371
V	Cutler & Robertson	18 U.S.C. § 1010
VI	Cutler & Robertson	18 U.S.C. § 371

Counts III and IV were severed for trial and Rosenfeld was convicted by a jury on the second count. It is clear that the gravamen of the indictment lies in 18 U. S. C. § 1010. Rule 8(b), Federal Rules of Criminal Procedure, 18 U. S. C. is standing refutation of Rosenfeld's argument in support of severance or faulty joinder:

> "Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."

Nothing we said in our majority decision of *U. S.* v. *Tuffanelli*, 131 F. 2d 890 (7th Cir. 1942), decided before that Federal Rule was adopted, collides with it. A clearly discernible pattern of action involving Cutler and his salesmen is traceable from the face of this record. *McElroy* v. *United States*, 164 U. S. 76 (1896) pressed on us by defendant, being factually dissimilar from the offenses spelled out in the indictment accusing Rosenfeld fails in lending strength for his position.

Government exhibits 2B and 4B, contracts of sale "Consolidated Home Improvement Co.," each bear the signatures of Rosenfeld and Cutler; exhibits 2A and 4A, signed

DARK PAGE BLEED

by Rosenfeld are F.H.A. Credit Applications, each showing Consolidated as the contractor. All the other contracts and credit applications, received in evidence, are in the name of Consolidated by Cutler and signed by other co-defendant salesmen. Section 1010 permeates this indictment and case. We think the indictment is sufficient and proper. *Wong Tai* v. *U. S.*, 273 U. S. 77 (1927); *U. S.* v. *Lotsch*, 102 F. 2d 35 (2nd Cir. 1939).

This record impressively attests the want of merit in defendant's position concerning his motions for judgment of acquittal, for a new trial, arrest of judgment and his challenge directed at the sufficiency of evidence underlying the jury's verdict. *Glasser* v. *United States*, 315 U. S. 60 (1942), *United States* v. *Aman*, 210 F. 2d 344 (7th Cir. 1954), and *United States* v. *Thayer*, 209 F. 2d 534 (7th Cir. 1954). Acting as Consolidated's salesman, Rosenfeld called upon Herbert Ray Johnson on February 9, 1954, and told him that his home had been selected to advertise siding. For each sale of this item, Rosenfeld told Johnson, the latter would receive $50 and these siding sales would pay his loan. When Johnson stated he was financially unable to undertake a contract, Rosenfeld offered him $300 to pay up his bills. As a result of the promises and bonuses, Johnson, his wife, and Rosenfeld signed the loan papers (Exhibits 2A-2B). Under the contract terms, Consolidated agreed to furnish all material and labor; the cash price, $1390, was to be financed under F. H. A. Title I. Absent from this contract is any mention of the $300 or the $50 per siding recitation. Government exhibit 2A, F. H. A. Title I Credit Application, executed by the Johnsons, and Rosenfeld, was transmitted to the Old National Bank, Evansville, Indiana.

Though Rosenfeld had been informed by Johnson concerning the latter's financial inability, and about various time payments to which he was committed, Rosenfeld cer-

EEDTHRU

tified, on Exhibit 2A: "I(We) certify that the above statements are true and that no unfavorable information known to me(us) or called for herein has been omitted. This application shall remain the property of the lending institution to which submitted." Of course, this exhibit is a credit application, and Johnson's purchasing of a furnace, ice-box, and television set were not reported on that form. Cutler, on the other hand and for his part, executed F. H. A. Title I completion certificate, for Johnson's project and forwarded it to the Old National Bank. A loan, resulting from the aforesaid contract, application and certificate was subsequently made by that institution and insured by F. H. A. Within a week of their first conversation, Rosenfeld gave Johnson $300, however the latter never received any $50 payments. There is evidence of similar approaches, contacts, and arrangements by Rosenfeld with other persons.

Since none of defendant Rosenfeld's points yield reversible errors, and because we find the record remarkably free of such errors, the judgment brought here for review is affirmed.

Judgment affirmed.

SCHNACKENBERG, *Circuit Judge.* I concur.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX II.

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

Chicago 10, Illinois.

Friday, June 29, 1956.

THE UNITED	STATES OF AMERICA, *Plaintiff-Appellee,*	Appeal from the United States District Court for the Southern District of Indiana, Evansville Division.
No. 11656	*vs.*	
JOHN D. ROS	SENFELD, *Defendant-Appellant.*	

Before Hon. PHILIP J. FINNEGAN, Hon. H. NATHAN SWAIM, Hon. ELMER J. SCHNACKENBERG, *Circuit Judges.*

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Indiana, Evansville Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED.

APPENDIX III.

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

Chicago 10, Illinois.

Monday, September 10, 1956.

THE UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. JOHN D. ROSENFELD, *Defendant-Appellant.*	Appeal from the United States District Court for the Southern District of Indiana, Evansville Division.

No. 11656

Before Hon. PHILIP J. FINNEGAN, Hon. H. NATHAN SWAIM, Hon. ELMER J. SCHNACKENBERG, *Circuit Judges.*

It is ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, DENIED.

DARK PAGE BLE

APPENDIX IV.

Rule 8, of the Federal Rules of Criminal Procedure, reads as follows:

"RULE 8, JOINDER OF OFFENSES AND OF DEFENDANTS.

(a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."

18 U. S. C. A., pages 179-180.

Count II of Indictment was based under Title 18 U. S. C. 371:

"SEC. 371. CONSPIRACY TO COMMIT OFFENSE OR TO DEFRAUD UNITED STATES.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

BLEEDTHRU

If, how
object of ver, the offense, the commission of which is the
ishment he conspiracy, is a misdemeanor only, the pun-
punishm r such conspiracy shall not exceed the maximum
t provided for such misdemeanor."

The st U. S. C., Sec. 371.

Indictme ute of the United States alleged in Count II of
"SEC. to have been violated is 18 U. S. C., Sec. 1010:
TIONS. 10. FEDERAL HOUSING ADMINISTRATION TRANSAC-
Whoe
vance of , for the purpose of obtaining any loan or ad-
or corpo redit from any person, partnership, association,
of credit tion with the intent that such loan or advance
Housing shall be offered to or accepted by the Federal
of obtain dministration for insurance, or for the purpose
of credit g any extension or renewal of any loan, advance
the acce r mortgage insured by such Administration, or
such a l nce, release, or substitution of any security on
fluencing n, advance of credit, or for the purpose of in-
makes, p n any way the action of such Administration,
the same ses, utters or publishes any statement, knowing
instrume o be false, or alters, forges, or counterfeits any
passes a , paper, or document, or utters, publishes, or
ing it to rue any instrument, paper, or document, know-
willfully ave been altered, forged, or counterfeited, or
be fined vervalues any security, asset, or income, shall
two year t more than $5,000 or imprisoned, not more than
or both."

U. S. C. A., Sec. 1010.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Rule involved	2
Statement	3
Argument	8
Conclusion	12

CITATIONS

CASES:

Blumenthal v. *United States*, 332 U.S. 539	10
Castellini v. *United States*, 64 F. 2d 636	9
Coco v. *United States*, 289 Fed. 33	9
Dunaway v. *United States*, 205 F. 2d 23	10
Gallaghan v. *United States*, 299 Fed. 172	9
Glasser v. *United States*, 315 U.S. 60	11
Kivette v. *United States*, 230 F. 2d 749	9
McElroy v. *United States*, 164 U.S. 76	9
Opper v. *United States*, 348 U.S. 84	11
Ross v. *United States*, 197 F. 2d 660	9
Scheve v. *United States*, 184 F. 2d 695	9
United States v. *Aman*, 210 F. 2d 344	11
United States v. *Hack*, 205 F. 2d 723	11
United States v. *Liss*, 137 F. 2d 995	9
United States v. *Thayer*, 209 F. 2d 534	11
United States v. *Tuffanelli*, 131 F. 2d 890	9

RULE:

Federal Rules of Criminal Procedure, Rule 8 ..... 2, 8, 9

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 488

JOHN A. ROSENFELD, *Petitioner,*

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. I 21-24) is reported at 235 F. 2d 544.

JURISDICTION

The judgment of the Court of Appeals was entered on June 29, 1956 (Pet. App. II 25). A petition for rehearing was denied on September 10, 1956 (Pet. App. III 26). The petition for a writ of certiorari was

filed on October 8, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a joint indictment charging petitioner and other co-defendant salesmen in separate counts, each with unlawfully procuring an F.H.A. insured loan in combination with defendant Cutler, and each with conspiring with defendant Cutler to procure such loans, charged transactions which could properly be joined under Rule 8, F. R. Crim. P.

2. Whether petitioner's conviction under the conspiracy count is supported by substantial evidence.

RULE INVOLVED

Rule 8 of the Federal Rules of Criminal Procedure provides:

> (a) *Joinder of Offenses.* Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.
>
> (b) *Joinder of Defendants.* Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and

all of the defendants need not be charged in each count.

STATEMENT

In the United States District Court for the Southern District of Indiana, petitioner was jointly tried with three other defendants—Cutler, Robertson and Jack Johnson. Petitioner and Cutler alone were named as defendants in Counts I and II charging that, with intent that an F.H.A. loan be obtained by purchasers of siding, they uttered an F.H.A. completion certificate, falsely warranting that the price of the siding represented the entire consideration for a loan, and further charging a conspiracy to commit that offense. The other two counts which were tried (Counts V and VI[1]) charged a similar utterance by Cutler and Robertson and a similar conspiracy among Cutler, Robertson and Jack Johnson (R. 5-9).[2] Petitioner's motion before trial for a severance had been denied (R. 2, 10-13). The jury found petitioner and Cutler guilty under counts I and II, and returned a verdict of acquittal as to all defendants on the other counts (R. 2-3, 18; Tr. 878-880). On October 27, 1954, the court sustained petitioner's motion for acquittal under count I and overruled his motion for a new trial and for arrest of judgment under count II (R. 3, 20-23). Petitioner was

---

[1] Counts III and IV alleging similar substantive and conspiracy charges against Cutler and another salesman, Wagner, had been severed before trial (R. 2). It appears that this severance was granted for reasons unconnected with the merits of this petition, namely that Wagner did not have counsel present at the day of trial. Defendant's Brief, Court of Appeals, p. 3.

[2] "R." refers to the printed record. "Tr." designates the typewritten Reporter's Transcript of the trial.

sentenced to two years imprisonment under count II (R. 24-25). The Court of Appeals unanimously affirmed the conviction (Pet. App. I 21-24).

Petitioner and co-defendants Robertson and Jack Johnson were employed by the Consolidated Home Improvement Company of Evansville, Indiana—owned by defendant Cutler—(Tr. 302, 319) as salesmen of siding. On February 9, 1954, petitioner called on Herbert Ray Johnson to sell him siding for his home (Tr. 96, 112). Johnson testified that petitioner advised him that if he purchased siding he would be paid $50 for each sale made by Consolidated in his district since his home was selected as a model to advertise the product (Tr. 97-99). Johnson told petitioner that he was ill and had other outstanding financial obligations and could not afford the purchase (Tr. 99, 101). Petitioner advised him that the $50 bonus arrangement would provide him with more than enough to pay for the siding and that he could keep the balance (Tr. 99). Petitioner also promised to give Johnson $300 to help pay his debts (Tr. 101). Johnson then agreed to make the purchase, and signed the loan papers because he thought he "had a good deal" (Tr. 100-101, 108-110). Present during the conversation and supporting Johnson's version of the transaction were his wife, Mrs. Ina O. Johnson, who also signed the loan papers, and his two brothers-in-law, Rollie and Tennyson Gidcumb (Tr. 142-171, 172-183, 277-295).

Johnson received the $300 promised by petitioner a week after the deal was closed, but received no $50 bonus payments (Tr. 103-106). He testified that peti-

tioner told him not to repeat anything concerning their conversation about these matters (Tr. 102).

On cross-examination, Johnson admitted that his home had needed siding (Tr. 112) but denied that he understood that the terms of the contract constituted the entire transaction (Tr. 119-120), or that the $50 bonus payments were to be made by Consolidated only if Johnson directly brought in other customers (Tr. 127-134).

The loan papers consisted of a Contract of Sale (Govt. Exh. 2b; Tr. 20-21), an F.H.A. Title I Credit Application (Govt. Exh. 2a; Tr. 20-21), and an F.H.A. Title I Completion Certificate (Govt. Exh. 2c; Tr. 20-21).

Under the contract, Consolidated agreed to furnish all labor and materials at a cost of $1390 to be financed under F.H.A. Title I. The contract made no mention of the $300 cash payment, or the $50 bonus for each additional siding job in Johnson's district.

The F.H.A. Title I Credit Application (Govt. Exh. 2a), dated February 9, 1954, did not contain an enumeration of Johnson's other existing obligations as required by its terms, although Johnson had told petitioner of these debts (Tr. 99-100). This application bore the signatures of Mr. and Mrs Johnson and petitioner. The F.H.A. Title I Completion Certificate bearing the signatures of Cutler and Herbert R. Johnson (Govt. Exh. 2c; Tr. 325) contained, *inter alia,* the following printed matter preceding Cutler's signature:

> (1) The above work or materials constitute the entire consideration for which this loan is made * * * (3) This Contract contains the whole agree-

> ment with the borrower (4) The borrower has not been given or promised a cash payment or rebate nor has it been represented to the borrower that he will receive a cash bonus or commission on future sales as an inducement for the consummation of this transaction. [Govt. Exh. 2c; Govt. Br. pp. 2-3.]

Johnson also certified in the completion certificate that no cash bonus or rebate had been made. His explanation was that he had not read the loan papers when he signed them because he was too excited, and "had confidence in it" (Tr. 107-108, 119-120).

The completion certificate and the other loan papers were submitted to the Old National Bank and checked for accuracy and completeness (Tr. 47-48). The loan was processed through the bank and insured by the F.H.A. (Pet. 5; Tr. 48).

Robert Brannon, a special agent of the F.B.I., testified for the government to an interview had with defendant Cutler on December 13, 1954. According to Brannon, Cutler told him that he gave petitioner $300 for Herbert Ray Johnson, knowing that said amount was not shown in the loan papers (Tr. 302). Cutler advised him further that he had instructed his salesmen individually not to employ the "model home" technique, and had no knowledge as to whether they used it (Tr. 303, 308-309). Immediately prior and subsequent to Brannon's testimony, and in his instructions, the trial judge advised the jury that Cutler's declarations could be used only against him and not against the other defendants (Tr. 297-300, 313, 855).

With respect to counts V and VI, the evidence

showed that def defendants Robertson and Jack Johnson[3] called on Curtis urtis O. Leach at his home for the purpose of selling him him siding (Tr. 202-203). According to Leach, Jack Jk Johnson promised him that, if he purchased siding, pg, his home would be used as a model and he would receiv ceive $50 as a bonus for every sale of siding in his neighbo hborhood, starting with his own purchase. Johnson lent nt him $100 to make the down payment (Tr. 203-207, 7, 210-211). About seven or eight weeks later Cutler ga gave him a check for the $50 (Tr. 211).

Both Jack Jk Johnson and Robertson testified in their own defense. e. They claimed that only after the sale was consumm nmated and the loan papers signed was Leach advised sed that if he referred customers of siding to Consolidat dated he would get a $50 bonus and that such agreeme nent was not part of the consideration for the sale. The hey denied any conversation that his home would be used sed as a model or that they had anything to do with the e completion certificate (Tr. 593-667, 613, 617-618, 676-7 3-702).

Evidence o of other previous siding transactions culminating in F F.H.A. insured loans involving the "bonus promise" an and "model home" technique was introduced by the e government. The court expressly limited the jury's con onsideration of these transactions to a showing of a comm nmon course of conduct, or knowledge, and not of a crim minal inclination or predisposition to commit the offe enses charged in the indictment (Tr. 352-353, 392-393 3, 418-419, 439-440, 855-856). Two such

[3] Jack Johnso son, one of the co-defendant salesmen, is to be distinguished from m Herbert Ray Johnson, the purchaser of the siding in the transacti tion involving petitioner and Cutler.

transactions were allegedly engineered by petitioner and Cutler. (Sale to William C. Becker in January 1954, Tr. 350-390, Govt. Exh. 8a, 8b, 8c, Tr. 363; sale to Robert C. Schaefer in January 1954, Tr. 391-407, Govt. Exh. 4a, 4b, 4c, Tr. 399). One transaction involved Cutler and an unidentified salesman. (Sale to Edward Stalely in October 1953, Tr. 408-440, Govt. Exh. 13a, 13b, 13c, Tr. 419). Two transactions involved Jack Johnson and Cutler. (Sale to J. Roy Adkisson in February 1954, Tr. 520-560, Govt. Exh. 7a, 7b, 7c, Tr. 531; sale to James R. Weber in February 1950, Tr. 441-502, Govt. Exh. 6a, 6b, 6c, Tr. 452). In each of these transactions, Cutler signed the Completion Certificate, while he or one of the salesmen signed the loan applications.

The trial judge in his instructions specifically advised the jury that they were "to pass on the evidence as it applies to each defendant separately in determining his guilt or innocence" (Tr. 842).

ARGUMENT

1. Petitioner argues (Pet. 9-14) that Rule 8 of the F.R. Crim. P. precluded a joint trial in the instant case since petitioner and the co-defendants were separately charged in counts involving separate, unrelated transactions. This contention has no substance. Authority to join petitioner and co-defendants in one indictment depends on whether the offenses charged "are of the same or similar character", and whether petitioner and the co-defendants were shown to have "participated in the same act or transaction or in the same series of acts or transactions constituting an of-

fense or offenses". Rule 8, F. R. Crim. P., *supra,* pp. 2-3. Failure to join all of the defendants in each count of such joint indictment would not, as petitioner argues, in itself render the joinder erroneous since Rule 8(b) specifically provides that "defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count".[4]

Here the indictment and the trial record clearly indicate that the offenses and the defendants were linked in a logical series of interrelated transactions which could properly be joined under the rule. Thus, both transactions involved salesmen of the Consolidated Home Improvement Company of Evansville, Indiana; both involved a strikingly parallel pattern of conduct

---

[4] *McElroy* v. *United States,* 164 U.S. 76, 79-80, relied on by petitioner, was decided under former R.S. 1024 (2d ed., 1878) which did not contain the express language now embodied in Rule 8(b) permitting joinder regardless of whether all the defendants be charged in each count. See *United States* v. *Liss,* 137 F. 2d 995, 998 (C.A. 2), in which Judge L. Hand stated that "[t]he mere fact that the accused are different in two counts is no longer important, despite what was said in *McElroy* v. *United States* * * *." See also *Scheve* v. *United States,* 184 F. 2d 695, 697 (C.A. D.C.); *Kivette* v. *United States,* 230 F. 2d 749, 753 (C.A. 5). For the same reasons, *Castellini* v. *United States,* 64 F. 2d 636 (C.A. 6); *Gallaghan* v. *United States,* 299 Fed. 172 (C.A. 8), and *Coco* v. *United States,* 289 Fed. 33 (C.A. 8), all decided before adoption of Rule 8(b), are not in conflict with the instant case. Moreover, the essential ruling in *McElroy* was simply that the offenses charged in the several indictments were "separate and distinct, complete in themselves and independent of each other * * *." 164 U.S. at 79. Aside from the question of joinder of all defendants in all counts, the basic rationale of *McElroy* is consistent with the instant case since there, as here, the test was whether the transactions were separate or interrelated. Cf. *Ross* v. *United States,* 197 F. 2d 660, 664 (C.A. 6); *United States* v. *Tuffanelli,* 131 F. 2d 890, 893 (C.A. 7).

i.e. the "model home" and "bonus" technique; the overt acts charged were essentially similar; Cutler played the same role in each transaction; and evidence of past activity revealed like transactions involving Cutler and these and other salesmen. (See Statement, *supra*, pp. 3.)

In totality the transactions appear as related threads of a common all pervading plan. Indeed, petitioner and all the co-defendants could reasonably have been named in the general conspiracy count for the individual salesmen, "[b]y their separate agreements, if such there were, * * * became parties to the larger common plan, joined together by their knowledge of its essential features and broad scope, though not of its exact limits, and by their common single goal." *Blumenthal* v. *United States*, 332 U.S. 539, 558. That the defendants were instead charged in separate conspiracy counts could have worked only to petitioner's benefit.

There is no showing of actual prejudice from the joinder. The jury did not confuse the proof but—as revealed by the selectivity of its verdict—sorted it carefully and limited its application to those defendants against whom the particular evidence was admitted, in accordance with the trial judge's directions. Cf. *Dunaway* v. *United States*, 205 F. 2d 23 (C.A. D.C.).

2. Petitioner argues further (Pet. 15-18) that there was no evidence upon which the jury could properly base a finding that he and Cutler had unlawfully conspired since the evidence showed only that he made an improper sale. The facts set forth in the Statement

refute this contention. The evidence showed a consistent pattern of conduct among Cutler and his salesmen, including petitioner, and the use of the same techniques—the credit application signed by the salesman; the completion certificate signed by Cutler; the payment to the purchaser. From all the evidence, the jury could reasonably conclude—as it did—that petitioner and Cutler were acting pursuant to a preconceived plan. Under well settled principles of law, the verdict is amply supported by evidence. *Glasser* v. *United States,* 315 U.S. 60; *United States* v. *Aman,* 210 F. 2d 344, 349 (C.A. 7); *United States* v. *Thayer,* 209 F. 2d 534, 538 (C.A. 7); *United States* v. *Hack,* 205 F. 2d 723, 728 (C.A. 7).[5]

---

[5] Petitioner argues (Pet. 17-18) that the only evidence from which the jury could find an unlawful agreement between petitioner and Cutler was the Brannon testimony, admitted only against Cutler, that Cutler admitted giving $300 to petitioner for Johnson (see Statement, *supra,* p. 6). This argument relies on the unsubstantiated premise that the jury disregarded the trial judge's explicit instructions and considered such testimony against petitioner. As pointed out by this Court in *Opper* v. *United States,* 348 U.S. 84, 95, "[o]ur theory of trial relies upon the ability of a jury to follow instructions * * *." As shown in the text, there was ample competent evidence to support the finding of conspiracy.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General,

WARREN OLNEY III,
Assistant Attorney General,

BEATRICE ROSENBERG,
JEROME M. FEIT,
Attorneys.

NOVEMBER 1956.

☆ U. S. GOVERNMENT PRINTING OFFICE 1956—407036/P.O. 504